

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

MICHAEL HUFTILE,

Plaintiff,

No. CIV S-03-1522 FCD DAD P

vs.

L.C. MICCIO-FONSECA,

Defendant.

FINDINGS AND RECOMMENDATIONS

Plaintiff is a civil detainee under California's Sexually Violent Predator Act (SVPA). He is proceeding pro se with a civil rights action pursuant to 42 U.S.C. § 1983. Before the court is defendant Dr. Miccio-Fonseca's motion to dismiss brought pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.¹ This is defendant's third motion to dismiss this action. Plaintiff has filed his opposition to the pending motion.

¹ In her notice of motion, defendant Miccio-Fonseca indicates that she is moving to dismiss pursuant to both Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure. However, she does not argue that the court lacks subject matter jurisdiction. A motion brought pursuant to Rule 12(b)(1) seeks dismissal on the grounds of lack of subject matter jurisdiction and is predicated either on a facial challenge that the allegations in a complaint are insufficient to invoke federal jurisdiction or a subfacial challenge disputing the truth of the allegations that would otherwise invoke federal jurisdiction. Safe Air for Everyone v. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). Here, defendant advances neither argument. Therefore, the court construes the motion as one brought pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted.

BACKGROUND

I. Case History²

This action has a lengthy and complex history in part because it is one of four cases that plaintiff has filed in this court relating to his 2002 civil commitment.³ The first of those four was a civil rights action brought against Dr. Val Farmer alleging that the doctor had violated plaintiff's constitutional rights by testifying at his 2002 civil commitment proceeding. See Huftile v. Farmer, CIV S-03-0585 DFL PAN P.⁴ The district court dismissed plaintiff's claims for damages and declaratory relief in that case pursuant to the holding in Heck v. Humphrey, 512 U.S. 477 (1994), granted defendant Farmer's motion for summary judgment on plaintiff's claims for injunctive relief and denied plaintiff's motion for preliminary injunction. Huftile v. Farmer, CIV S-03-0585 DFL PAN P, Order filed Mar. 17, 2006 at 2.

Next, plaintiff filed a civil rights action against Dr. Jack Vognsen⁵ alleging that Dr. Vognsen's improper actions resulted in plaintiff being found a sexually violent predator and seeking prospective injunctive relief prohibiting the doctor from taking such actions in the future. Huftile v. Vognsen, CIV S-03-0604 RRB JFM P. On June 22, 2007, the assigned magistrate

² For the sake of completeness, the undersigned will once again set out the history of this litigation which, for the most part, was addressed in this court's September 27, 2007 order. (See Doc. No. 53 at 1-4.)

³ A court may take judicial notice of court records. See MGIC Indem. Co. v. Weisman, 803 F.2d 500, 504 (9th Cir. 1986); United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980) ("a court may take judicial notice of its own records in other cases, as well as the records of an inferior court in other cases.").

⁴ Defendant Farmer had provided counseling services to plaintiff in 1983, conducted a psychological evaluation and testified as a defense witness at plaintiff's 1984 child molestation/rape trial in South Dakota. See Huftile v. Farmer, CIV S-03-0585 DFL PAN P, Findings and Recommendations (F&R) filed Feb 10, 2006 at 2. In plaintiff's 2002 civil commitment proceeding, Dr. Farmer's 1984 report was submitted into evidence by the district attorney without objection and Dr. Farmer was called to testify by the state. Id. at 3.

⁵ Both Dr. Vognsen and the doctor named as a defendant in this action, Dr. Miccio-Fonseca, served as evaluators of plaintiff in connection with the 2002 civil commitment proceeding and both were called to testify in connection with those proceedings by the state.

1 judge in that action filed findings and recommendations recommending that defendant Vognsen's
2 motion to dismiss be granted.⁶ Therein, the assigned magistrate judge concluded that plaintiff
3 was not entitled to prospective injunctive relief against defendant Dr. Vognsen.⁷ Those findings
4 and recommendations were adopted in full by the assigned district judge on November 6, 2007,
5 and judgment was entered in favor of defendant Dr. Vognsen that same day.

6 In addition to his civil rights cases, on January 27, 2005, plaintiff filed a petition
7 for a writ of habeas corpus challenging his 2002 civil commitment. See Huftile vs. Hunter, CIV
8 S-05-0174 GEB DAD P. In that habeas petition plaintiff challenged the November 1, 2002,
9 finding by the Sacramento County Superior Court that he was a sexually violent predator on the
10 grounds that: (1) the evidence was insufficient to support the jury's finding; and (2) the trial court
11 violated his right to due process when it excluded evidence that he was subject to an outstanding
12 arrest warrant out of South Dakota for completion of a criminal sentence imposed against him in
13 that state. On January 16, 2009, the undersigned issued findings and recommendations
14 recommending that the habeas petition be denied. On February 17, 2009, those findings and
15 recommendations were adopted by the assigned district judge and judgment was entered
16 accordingly. No appeal was taken.

17 The above-entitled action is now the final remaining case of the four (three civil
18 rights, one habeas) cases filed by plaintiff in this court, with respect to his 2002 civil
19 commitment proceeding. Plaintiff filed his complaint in this action on July 17, 2003, pursuant to
20 42 U.S.C. § 1983 and therein challenged the manner in which defendant Dr. Miccio-Fonseca
21 conducted her 2002 evaluation of plaintiff. Specifically, plaintiff alleged that Dr. Miccio-
22 Fonseca violated confidentiality rules and codes of professional ethics by reviewing plaintiff's

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24 ⁶ Plaintiff filed an interlocutory appeal to the Ninth Circuit in connection with that
25 action. The appeal was dismissed by the Ninth Circuit for lack of jurisdiction on October 3,
26 2007.

⁷ The prospective injunctive relief rejected in that case was similar to that which plaintiff
seeks in this action against Dr. Miccio-Fonseca.

1 prison file, medical records, psychological evaluations, and police and court records without his
 2 consent. (See Huftile v. Miccio-Fonseca, CIV S-03-1522 FCD DAD P, Doc. No. 5 at 3.)
 3 Plaintiff also alleged that Dr. Miccio-Fonseca's report contained false and unsupported
 4 statements, inaccurate test results, incomplete information and unsound conclusions. (Id.) In his
 5 original complaint plaintiff sought damages as well as declaratory relief and made vague
 6 reference to injunctive relief that would "prevent[] Defendant from inflicting further injury upon
 7 Plaintiff." (Compl. at 27.)

8 On August 15, 2003, the undersigned recommended that the action be dismissed
 9 as barred by the holding in Heck v. Humphrey. Those findings and recommendations were
 10 adopted by the assigned district judge on September 4, 2003. Plaintiff appealed and, on June 10,
 11 2005, the U.S. Court of Appeals for the Ninth Circuit affirmed the dismissal of plaintiff's claims
 12 for damages and declaratory relief, finding that the rule announce in Heck did apply to
 13 individuals detained under California's SVPA. Huftile v. Miccio-Fonseca, 410 F.3d 1136, 1139-
 14 41 (9th Cir. 2005). The court also concluded that "a judgment in favor of Huftile in his § 1983
 15 action would necessarily imply the invalidity of his civil commitment." 410 F.3d at 1141.⁸ The
 16 Ninth Circuit, however, reversed the dismissal of plaintiff's claim for injunctive relief which
 17 sought an order preventing Dr. Miccio-Fonseca from inflicting further injury upon him. Id. at
 18 1141. Specifically, the court stated in this latter regard:

19 While Huftile's claims for damages and declaratory relief are
 20 barred by Heck, Huftile's claim for injunctive relief is not barred.
 21 We therefore reverse the portion of the district court's order
 22 finding a Heck bar to injunctive relief. We do not decide whether
 Huftile is, in fact, entitled to injunctive relief. On remand, the
 district court will be free, through appropriate procedures, to
 decide on the propriety of such relief.

23 Id.

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 25 ⁸ The Ninth Circuit did remand the matter so that dismissal of those claims could be
 26 specified as without prejudice to plaintiff filing a § 1983 action seeking such relief in the event
 his civil commitment was subsequently invalidated through some other means such as the
 granting of habeas relief. 410 F.3d at 1142.

1 Following remand, on March 8, 2006, the undersigned filed findings and
2 recommendations recommending that plaintiff's claims for damages and declaratory relief be
3 dismissed without prejudice and that this action proceed solely on his claim for prospective
4 injunctive relief. Those findings and recommendations were adopted by the assigned district
5 judge on April 19, 2006. On July 24, 2006, defendant filed a motion to dismiss plaintiff's sole
6 remaining claim for injunctive relief. Rather than opposing that motion, on July 31, 2006,
7 plaintiff filed an amended complaint, erroneously titled "Second Amended Complaint."⁹

8 In a lengthy narrative plaintiff's second amended complaint listed thirteen claims
9 and eight requests for injunctive relief. His claims fell into the following four groups: (1)
10 challenges to the methodology, accuracy and sufficiency of Dr. Miccio-Fonseca's evaluation,
11 including her alleged misconstruing of facts relating to plaintiff's South Dakota conviction
12 involving his stepdaughter; (2) claims that both the Clinical Evaluator Handbook and
13 Standardized Assessment Protocol (SAP) manual used by Dr. Miccio-Fonseca in conducting
14 plaintiff's evaluation are "illegal"; (3) claims that Dr. Miccio-Fonseca violated plaintiff's
15 constitutional right to privacy, his contract rights and the doctor/patient and husband/wife
16 privileges by accessing his prison files, medical files and the records of Dr. Farmer without
17 plaintiff's consent; and (4) claims that Dr. Miccio-Fonseca violated plaintiff's rights by her
18 failure to tape record his interviews, produce a copy of the court order requiring plaintiff to be
19 interviewed and to provide proper notice to plaintiff before the interviews and advise him of his
20 right to have counsel present. Based upon these alleged unconstitutional acts by Dr. Miccio-
21 Fonseca, plaintiff sought prospective injunctive relief in the form of an order: (1) barring Dr.
22 Miccio-Fonseca from "approaching Plaintiff in any official or unofficial manner" without the
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24 ⁹ Although titled "Second Amended Complaint," this document was actually plaintiff's
25 amended complaint. The only previously filed complaint was the original complaint (Doc. No.
26 1) filed on July 17, 2003. Nevertheless, in order to avoid any further confusion the court has
used plaintiff's description and referred to the complaint filed July 31, 2006 (Doc. No. 27), as
plaintiff's second amended complaint.

1 presence of counsel; (2) prohibiting Dr. Miccio-Fonseca, state evaluators or other agents of the
 2 State of California from using or referring to Dr. Miccio-Fonseca's evaluation of plaintiff; (3)
 3 requiring that all records of Dr. Miccio-Fonseca's evaluation of plaintiff be destroyed; (4)
 4 prohibiting Dr. Miccio-Fonseca, other evaluators and agents of California from using Dr. Val
 5 Farmer's reports, evaluations or testimony; (5) prohibiting any contact with plaintiff's ex-wife
 6 and requiring that all records of past conversations with plaintiff's ex-wife be destroyed; (6)
 7 prohibiting Dr. Miccio-Fonseca, other evaluators and agents of California from using the Clinical
 8 Evaluator Handbook and Standardized Assessment Protocol (SAP); (7) prohibiting the use of his
 9 South Dakota conviction, involving plaintiff's stepdaughter, as a predicate offense under the
 10 SVPA; and (8) barring Dr. Miccio-Fonseca and other evaluators and agents of California from
 11 falsely characterizing the nature of his South Dakota conviction.¹⁰

12 On February 9, 2007, defendant responded to plaintiff's second amended
 13 complaint with another motion to dismiss, which plaintiff opposed.¹¹ On September 27, 2007,
 14 the court granted the motion to dismiss, noting that plaintiff had simply alleged many of the same
 15 claims that the Ninth Circuit had already found to be Heck-barred because plaintiff's success on
 16 those claims would necessarily imply the invalidity of his civil commitment and because he had
 17 not alleged facts entitling him to prospective injunctive relief and was seeking said relief against
 18 individuals who were not parties to this action. (Doc. No. 53 at 13-18.) Out of an abundance of
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20 ¹⁰ By order filed December 8, 2006, the undersigned denied defendant's motion to
 21 dismiss without prejudice in light of plaintiff's right to amend his complaint prior to the filing of
 22 a responsive pleading. Defendant was directed to file a response to the second amended
 23 complaint.

24 ¹¹ On August 14, 2006, plaintiff also filed a motion for preliminary injunction and on
 25 September 14, 2006, a motion to reinstate his claims for damages and declaratory relief.
 26 Plaintiff's motion for preliminary injunction was denied as defective and premature and the
 undersigned recommended that the motion to reinstate his claims for declaratory relief and
 damages be denied. The findings and recommendations were adopted by the assigned District
 Judge on February 20, 2007. On March 5, 2007, plaintiff filed a notice of appeal from the court's
 order denying his motion to reinstate his requests for declaratory relief and damages and, on July
 27, 2007, that appeal was dismissed for lack of jurisdiction.

1 caution, the court granted plaintiff leave to file a third amended complaint in order to provide
2 him a final opportunity to allege a cognizable claim for prospective injunctive relief as to
3 defendant Dr. Miccio-Fonseca.¹²

4 On November 29, 2007, plaintiff filed his third amended complaint. On
5 November 6, 2008, the court ordered defendant to file her response. On December 22, 2008,
6 defendant filed the pending motion to dismiss. On March 9, 2009, plaintiff filed his opposition.

7 II. Plaintiff's Civil Commitment Proceedings

8 Defendant Dr. Miccio-Fonseca was one of two evaluators designated by the
9 California Department of Mental Health to assist in the determination of whether plaintiff fell
10 within California's SVPA, California Welfare & Institutions Code §§ 6600, et. seq. On February
11 2, 2001, Dr. Miccio-Fonseca attempted to interview plaintiff but he refused to be interviewed.
12 (Third Am. Compl. at 4.) Dr. Miccio-Fonseca submitted her evaluation report, dated March 26,
13 2001, based solely on a review of plaintiff's Central File. (Id., at 4 & Ex. 2.)

14 On April 20, 2001, following a probable cause hearing on the petition for
15 plaintiff's civil commitment, the assigned Sacramento County Superior Court judge determined
16 that there was probable cause to believe that plaintiff was likely to engage in sexually violent
17 predatory criminal behavior after being released from prison. (Id. at 4.)

18 On June 27, 2002, Dr. Miccio-Fonseca was directed to interview plaintiff for an
19 updated evaluation but plaintiff again refused to be interviewed. (Third Am. Compl. at 4-5.) Dr.
20 Miccio-Fonseca prepared an updated report based on a review of plaintiff's Central File and
21 using actuarial scales. (Id., Ex. 5.)

22 On October 21, 2002, plaintiff's civil commitment trial commenced. (Id. at 5-6.)
23 Dr. Miccio-Fonseca testified at the trial. (Id. at 6.) On November 1, 2002, the jury rendered a
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25 ¹² In that order the court also advised plaintiff of the legal standards governing his request
26 for a permanent injunction and any due process, equal protection, Fifth and Sixth Amendment
claims he might be seeking to pursue.

1 true verdict against plaintiff, finding beyond a reasonable doubt that he is a sexually violent
2 predator. (Third Am. Compl. at 6.)

3 Plaintiff's initial civil commitment expired on November 1, 2004. (Id. at 8.) A
4 second petition for the period November 1, 2004 to November 1, 2006 was granted. (Id.) A
5 third petition for the period November 1, 2006 to November 1, 2008 has subsequently been
6 granted. (Id.)

7 **PLAINTIFF'S THIRD AMENDED COMPLAINT**

8 Plaintiff's third amended complaint differs somewhat from his prior complaints
9 filed in this action. Plaintiff now alleges as follows. Defendant Dr. Miccio-Fonseca violated his
10 due process rights in three respects. First, Dr. Miccio-Fonseca relied on "inaccurate data
11 material" concerning plaintiff's 1984 conviction in South Dakota in preparing her evaluation.
12 (Id. at 12.) Plaintiff contends that his South Dakota conviction was not a qualifying offense
13 under the SVPA because the victim was his adopted daughter and the offense did not result in an
14 "extra-familiar [sic] conviction[.]" (Id. at 9.) Second, Dr. Miccio-Fonseca failed to provide
15 plaintiff with proper advance notice of the February 2001 interview. (Id. at 13.) Plaintiff
16 contends that because he did not receive adequate notice, he did not have "ample time to procure
17 any and all pertinent material data pertaining to his 1984 South Dakota conviction" to show that
18 it involved an "incestuous familiar [sic] offense." (Id.) Plaintiff alleges that because of the lack
19 of notice he "was forced to . . . decline to interview[.]" (Id.) Third, Dr. Miccio-Fonseca failed to
20 follow the state court's order to audio tape his mental examination in violation of California
21 Code of Civil Procedure 2032.530(a). (Id. at 14.) Plaintiff contends that he declined to be
22 interviewed, in part, because the doctor failed to comply with this requirement. (Id.)

23 In the prayer for relief set out in his third amended complaint, plaintiff requests
24 the following prospective injunctive relief:

25 A. An order barring Defendant Miccio-Fonseca from rendering a
26 "legal conclusion" on whether Plaintiff's 1984 South Dakota
conviction is a predicate sexually violent offense;

1 B. An order barring Defendant Miccio-Fonseca from approaching
2 Plaintiff Huftile in any manner in the future;

3 C. An order prohibiting Defendant Miccio-Fonseca from further
4 utilizing her constitutionally defective evaluation of Plaintiff
5 further against Plaintiff;

6 D. An order expunging Defendant Miccio-Fonseca's prior
7 evaluations (February 2001, and June 2002) from further
8 proceedings under the SVP Act; and

9 E. An order enjoining Defendant Miccio-Fonseca from acting in a
10 similar manner in the future to the detriment of Plaintiff Huftile.

11 (Id. at 16.)

12 **PARTIES' ARGUMENTS**

13 I. Defendant's Motion to Dismiss

14 Counsel on behalf of defendant Dr. Miccio-Fonseca argues that plaintiff's request
15 for injunctive relief is barred because it is still predicated on the notion that the doctor's mental
16 health evaluation reports and her testimony were somehow constitutionally flawed. (Motion to
17 Dismiss (MTD) at 5.) Counsel argues that regardless of the relief sought, under Heck v.
18 Humphrey, 512 U.S. 477, 487 (1994), if plaintiff's success in this action would necessarily imply
19 the invalidity of his civil commitment, plaintiff may not proceed on his claims unless that
20 commitment has been invalidated. (Id.)

21 Second, counsel argues that under the Younger abstention doctrine, this court
22 should abstain from accepting jurisdiction over plaintiff's claims because his civil commitment
23 proceedings are ongoing. (Id. at 6.) In this regard, counsel argues that Younger abstention
24 applies where there is an ongoing state judicial proceeding. (Id.) Here, according to counsel,
25 state court proceedings are ongoing in the sense that under the SVPA, there are annual reviews of
26 plaintiff's mental condition and he is entitled to a hearing if the annual review shows his
condition has so changed that he no longer meets the definition of a sexually violent predator or
if conditional release is a less restrictive alternative. (Id.) In addition, defense counsel argues

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1 that plaintiff has an opportunity to raise any claims that his federal constitutional rights are being
2 violated in those ongoing state review proceedings.

3 Third, counsel argues that plaintiff cannot obtain the permanent injunction he
4 seeks against Dr. Miccio-Fonseca because he “cannot show actual success on the merits and the
5 likelihood of irreparable harm.” (*Id.* at 8) (quoting *Clement v. California Dep’t of Corrections*,
6 220 F. Supp. 2d 1098, 1114-15 (N.D. Cal. 2002)). Counsel notes that in his third amended
7 complaint plaintiff claims that Dr. Miccio-Fonseca failed to tape record her interviews of him,
8 attempted to interview plaintiff without giving him adequate prior notice which in turn deprived
9 him of an opportunity to challenge the reliability of documents with respect to his qualifying
10 offenses. (*Id.*) However, defense counsel contends that plaintiff cannot succeed on the merits of
11 these claims because the SVPA required Dr. Miccio-Fonseca to take each of the challenged
12 actions. (*Id.*) Counsel asserts that in assessing whether plaintiff has a diagnosable mental
13 disorder or factors known to be associated with the risk of reoffense among sex offenders, Dr.
14 Miccio-Fonseca properly reviewed his criminal and psychosexual history and previous mental
15 health evaluations. (*Id.*) Counsel argues that while plaintiff may be dissatisfied with the
16 conclusions reached by Dr. Miccio-Fonseca, plaintiff does not have a right to a particular mental
17 health diagnosis. (*Id.* at 9.) Thus, counsel contends, plaintiff cannot succeed on his claims that
18 Dr. Miccio-Fonseca violated his constitutional rights and this action should be dismissed. (*Id.*)

19 Counsel also argues that plaintiff cannot succeed on the merits of his due process
20 claims because he does not have a protected interest and, in any event, received all the process to
21 which he was due. (*Id.*) Counsel notes that plaintiff received mental health evaluations, a
22 probable cause hearing and a jury trial and that plaintiff himself does not contend that the
23 procedural protections of the SVPA were denied to him. (*Id.*) In addition, counsel observes that
24 the SVPA does not require that one subject to civil commitment proceedings be given prior
25 notice of the mental health evaluations or that a tape recording of those evaluations be provided.
26 (*Id.*) Counsel argues that plaintiff’s reference to the California Code of Civil Procedure as

1 requiring defendant's interview be audio-taped applies to civil discovery, not mental health
2 evaluations under the SVPA. (Id.) Moreover, defense counsel asserts that there is no law
3 establishing a right to direct what information the mental health evaluator will consider or what
4 procedures the evaluator will use to verify the accuracy of related documents. (Id.) Counsel
5 contends that plaintiff could have obtained an independent mental health examination to review
6 the same medical records and psychological reports that were available to Dr. Miccio-Fonseca.
7 (Id. at 10.) In any event, counsel argues, the subsequent jury trial at which plaintiff was
8 represented by counsel provided an opportunity for plaintiff to challenge any inadequacy with
9 respect to the mental health evaluations. (Id.)

10 In conclusion, counsel for defendant Dr. Miccio-Fonseca asserts that in order to
11 be entitled to injunctive relief, plaintiff must demonstrate some irreparable harm. Counsel argues
12 that plaintiff cannot show any such irreparable harm flowing from any alleged inaccuracies in the
13 information reviewed or biases reflected in the reports or testimony provided by Dr. Miccio-
14 Fonseca. (Id.) This is because plaintiff had a probable cause hearing and a trial at which time
15 both he and his counsel were provided access to the same information that was made available to
16 Dr. Miccio-Fonseca. (Id.) Moreover, Dr. Miccio-Fonseca was subject to cross-examination.
17 (Id.) Finally, plaintiff is entitled to yearly reviews of his mental condition as well as to the
18 appointment of an expert who would be provided access to all of the records in question. (Id. at
19 11.) Under these circumstances, defense counsel argues, plaintiff cannot obtain a permanent
20 injunction because he cannot show that he will be irreparably harmed by any alleged errors
21 committed by defendant Dr. Miccio-Fonseca. (Id.)

22 II. Plaintiff's Opposition

23 Plaintiff opposes the motion to dismiss. Plaintiff argues that Younger abstention
24 is inapplicable here because his request for expungement or redaction of defendant Dr. Miccio-
25 Fonseca's psychological evaluations is not the subject of any ongoing judicial proceeding in state
26 court. (Opp'n at 4.) Plaintiff argues that any ongoing SVPA proceedings involving him are

1 independent of his 2002 civil commitment proceeding. (Id. at 5.) Plaintiff seeks the
2 expungement or redaction of defendant Dr. Miccio-Fonseca's psychological evaluations from his
3 record because her inaccurate conclusion that his South Dakota conviction for raping his step-
4 daughter is a qualifying conviction will be relied upon in the future by other psychologists who
5 will evaluate plaintiff in connection with SVPA review proceedings. (Id.)

6 Next, plaintiff argues that he does not challenge the "procedural process"
7 provided for by the SVPA, but rather, "the **conclusion drawn** by the defendant, which
8 substantially alters facts concerning the South Dakota conviction." (Id. at 7) (emphasis in
9 original). Plaintiff also contends that he does not challenge defendant Dr. Miccio-Fonseca's
10 evaluation due to her review of his prison and medical files, psychological and social history, or
11 her use of the Static-99 test. (Id.) Instead, plaintiff challenges "her conclusion concerning the
12 South Dakota conviction (as a predicate sexually violent offense under the SVP statute)" and
13 seeks to have that "invalid conclusion" redacted and expunged from the record. (Id.) In this
14 regard, plaintiff contends that he "is not claiming expungement/redaction of the Miccio-
15 Fonseca's psychological reports is a constitutional right, but rather, plaintiff seeks
16 expungement/redaction as an equitable remedy under 42 U.S.C. § 1983 for alleged violations of
17 his constitutional right to due process." (Id. at 8.)

18 As to the his right to have his mental examination tape recorded, plaintiff argues
19 that California's Civil Discovery Act of 1986 establishes this right. (Id.) Relying on California
20 law, plaintiff contends that the Civil Discovery Act of 1986 applies to SVPA cases such as his.
21 (Id.)

22 Finally, plaintiff argues that he is seeking an injunction prohibiting defendant
23 from "ever again (1) utilizing Mr. Huftile's South Dakota conviction to his detriment, (2) to
24 expunge or redact her prior erroneous mental health conclusion concerning his South Dakota
25 conviction, and (3) enjoining defendant from any future mental health examinations of plaintiff
26 under the SVP Act." (Id. at 10.) He argues that such an injunction is necessary because other

1 evaluators will read defendant Dr. Miccio-Fonseca's reports in the future and will adopt the same
 2 conclusion "since that conclusion has become final as to the plaintiff." (Id. at 9.) Lastly,
 3 plaintiff argues that expungement of defendant Dr. Miccio-Fonseca's erroneous conclusion that
 4 his South Dakota conviction is a qualifying offense under the SVPA is an equitable remedy
 5 available to him through this § 1983 action. (Id. at 10.)

6 **APPLICABLE LEGAL STANDARDS**

7 I. Legal Standards Applicable to a Rule 12(b)(6) Motion to Dismiss

8 A motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil
 9 Procedure tests the sufficiency of the complaint. North Star Int'l v. Arizona Corp. Comm'n, 720
 10 F.2d 578, 581 (9th Cir. 1983). Dismissal of the complaint, or any claim within it, "can be based
 11 on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a
 12 cognizable legal theory." Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1990).
 13 See also Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984).

14 Rule 8(a)(2) of the Federal Rules of Civil Procedure "requires only 'a short and
 15 plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the
 16 defendant fair notice of what the . . . claim is and the grounds upon which it rests.'" Bell Atlantic
 17 Corp. v. Twombly, 550 U.S. 544, 555 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47
 18 (1957)). However, in order to survive dismissal for failure to state a claim a complaint must
 19 contain more than "a formulaic recitation of the elements of a cause of action;" it must contain
 20 factual allegations sufficient "to raise a right to relief above the speculative level." Bell Atlantic
 21 Corp., 550 U.S. at 555.

22 In determining whether a pleading states a claim, the court accepts as true all
 23 material allegations in the complaint and construes those allegations, as well as the reasonable
 24 inferences that can be drawn from them, in the light most favorable to the plaintiff. Hishon v.
 25 King & Spalding, 467 U.S. 69, 73 (1984); Hosp. Bldg. Co. v. Trustees of Rex Hosp., 425 U.S.
 26 738, 740 (1976); Love v. United States, 915 F.2d 1242, 1245 (9th Cir. 1989). In the context of a

1 motion to dismiss, the court also resolves doubts in the plaintiff's favor. Jenkins v. McKeithen,
 2 395 U.S. 411, 421 (1969). However, the court need not accept as true conclusory allegations,
 3 unreasonable inferences, or unwarranted deductions of fact. W. Mining Council v. Watt, 643
 4 F.2d 618, 624 (9th Cir. 1981).

5 In general, pro se pleadings are held to a less stringent standard than those drafted
 6 by lawyers. Haines v. Kerner, 404 U.S. 519, 520 (1972). The court has an obligation to construe
 7 such pleadings liberally. Bretz v. Kelman, 773 F.2d 1026, 1027 n.1 (9th Cir. 1985) (en banc).
 8 However, the court's liberal interpretation of a pro se complaint may not supply essential
 9 elements of the claim that were not pled. Ivey v. Bd. of Regents of Univ. of Alaska, 673 F.2d
 10 266, 268 (9th Cir. 1982); see also Pena v. Gardner, 976 F.2d 469, 471 (9th Cir. 1992).

11 II. Legal Standards Applicable to Actions Seeking Injunctive Relief

12 The United States Supreme Court has identified the requirements for the granting
 13 of permanent injunctive relief. as follows:

14 According to well-established principles of equity, a plaintiff
 15 seeking a permanent injunction must satisfy a four-factor test
 16 before a court may grant such relief. A plaintiff must demonstrate:
 17 (1) that it has suffered an irreparable injury; (2) that remedies
 18 available at law, such as monetary damages, are inadequate to
 compensate for that injury; (3) that, considering the balance of
 hardships between the plaintiff and defendant, a remedy in equity
 is warranted; and (4) that the public interest would not be disserved
 by a permanent injunction.

19 eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). See also Weinberger v. Romero-
 20 Barcelo, 456 U.S. 305, 312 (1982) (In exercising their sound discretion, courts should pay
 21 particular regard to public consequences in granting an injunction.); American-Arab Anti-
 22 Discrimination Committee v. Reno, 70 F.3d 1045, 1066-67 (9th Cir. 1995) ("The requirements
 23 for the issuance of a permanent injunction are the likelihood of substantial and immediate
 24 irreparable injury and the inadequacy of remedies at law.") In addition, in seeking prospective
 25 injunctive relief, plaintiff must allege facts that if proven would establish that he is likely to

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suffer future injury if defendant is not so enjoined. See Hodgers-Durgin v. De La Vina, 199 F.3d 1037, 1042 (9th Cir. 1999). Thus, as the Ninth Circuit has observed:

In a suit for prospective injunctive relief, a plaintiff is required to demonstrate a real and immediate threat of future injury. City of Los Angeles v. Lyons, 461 U.S. 95, 101-02, 103 S. Ct. 1660, 75 L. Ed.2d 675 (1983) (holding that the threat must be “‘real and immediate’” as opposed to “‘conjectural’ or ‘hypothetical’”). The key issue is whether the plaintiff is “‘likely to suffer future injury.’” Id. at 105, 103 S. Ct. 1660; see also O’Shea v. Littleton, 414 U.S. 488, 496, 498, 94 S. Ct. 669, 38 L. Ed.2d 674 (1974).

Jones v. City of Los Angeles, 444 F.3d 1118, 1126 (9th Cir. 2006).

Of course, “the court is not obliged to accept allegations of future injury which are overly generalized, conclusory, or speculative.” Stevens v. Harper, 213 F.R.D. 358, 370 (E.D. Cal. 2002). See also City of Los Angeles v. Lyons, 461 U.S. 95, 105-08 & n.7 (1983) (a plaintiff is required to credibly allege that he faces a realistic threat of future harm from the practice he seeks to enjoin); Goldie’s Bookstore v. Superior Court, 739 F.2d 466, 472 (9th Cir. 1984) (“Speculative injury does not constitute irreparable injury.”)

The standards for permanent injunction and preliminary injunction are essentially the same with the exception that in order for a permanent injunction to issue, plaintiff must ultimately show actual success on the merits, instead of probable success on the merits. Amoco Prod. Co. v. Village of Gambell, 480 U.S. 531, 546 n.12 (1987); see also Walsh v. City and County of Honolulu, 460 F. Supp. 2d 1207, 1211 (D. Hawaii 2006).¹³

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¹³ “The proper legal standard for preliminary injunctive relief requires a party to demonstrate ‘that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.’” Stormans, Inc. v. Selecky, 571 F.3d 960, 978 (9th Cir. 2009) (quoting Winter v. Natural Res. Def. Council, Inc., ___ U.S. ___, 129 S. Ct. 365, 374 (2008)). Of course, in cases brought by prisoners involving conditions of confinement, any preliminary injunction “must be narrowly drawn, extend no further than necessary to correct the harm the court finds requires preliminary relief, and be the least intrusive means necessary to correct the harm.” 18 U.S.C. § 3626(a)(2).

1 III. California's Sexually Violent Predators Act (SVPA)

2 The SVPA became effective on January 1, 1996 and reflected “the Legislature’s
3 determination of the importance of identifying and controlling persons whose criminal history
4 and mental state render them sexually violent predators.” Hubbs v. Alamo, 360 F. Supp. 2d
5 1073, 1076 (C.D. Cal. 2005) (quoting Albertson v. Superior Court, 25 Cal. 4th 796, 810 (Cal.
6 2001)).

7 The procedures set out under the SVPA have been summarized by the Ninth
8 Circuit as follows:

9 California's SVP Act requires that a prisoner who was previously
10 convicted of certain enumerated violent sex crimes be evaluated by
11 the Department of Corrections, the Board of Prison Terms, and the
12 California Department of Mental Health six months before being
13 released from prison to determine whether the prisoner may be a
14 potential SVP. See Cal. Welf. & Inst.Code § 6601(a)(1). This
15 screening involves review of the prisoner's background and
16 criminal record. See id. § 6601(b). If the Department of
17 Corrections concludes that the prisoner is likely to be an SVP, the
18 prisoner is referred to the Department of Mental Health for a “full
19 evaluation” to determine whether the prisoner meets the other
20 criteria in the SVP Act. See id.

21 This full evaluation must be conducted in accordance with a
22 standardized assessment protocol by at least two practicing
23 psychiatrists or psychologists designated by the Department of
24 Mental Health. See id. § 6601(c) & (d). The two evaluators must
25 agree that the prisoner has a mental disorder and is dangerous
26 within the meaning of section 6600 for proceedings to go forward
under the SVP Act. [fn. omitted.] See id. § 6601(d). If the two
evaluators agree that the prisoner should be civilly committed
under the SVP Act, the Department of Mental Health will then
transmit a request for a petition for commitment to the county in
which the alleged SVP was convicted. At that time the
Department of Mental Health will also send the county copies of
the psychiatric evaluations prepared by the evaluators and any
other supporting documentation. See id. § 6601(d), (h), & (i).

“If the county's designated counsel [either the district attorney or
county counsel] concurs with the recommendation, a petition for
commitment shall be filed in the [county's] superior court...” Id. §
6601(i). Once the petition for civil commitment is filed in the
superior court by the county's designated counsel, a superior court
judge will then hold a “probable cause hearing.” Id. § 6602(a). At

1 this hearing, the prisoner is entitled to assistance of counsel.
2 The superior court judge will determine at the hearing whether
3 there is probable cause to believe that the prisoner is likely to
4 engage in sexually violent, predatory criminal behavior after being
5 released from prison. See id. If the judge determines there is no
6 probable cause, the judge shall dismiss the petition for
7 commitment. If, however, the judge determines that probable
8 cause exists, the judge must order the prisoner to remain in custody
9 pending a civil commitment trial to determine whether the prisoner
10 is, by reason of a diagnosed mental disorder, a danger to the health
11 and safety of others and likely to engage in acts of sexual violence
12 upon release from prison.

13 Despite the fact that the commitment trial is civil in nature, the
14 prisoner is nonetheless “entitled to a trial by jury, to the assistance
15 of counsel, to the right to retain experts or professional persons to
16 perform an examination on his or her behalf, and to have access to
17 all relevant medical and psychological records and reports.” Id.
18 [Cal. Welf. & Inst. Code] § 6603. If the prisoner is indigent, then
19 she or he is entitled to court-appointed counsel and court-appointed
20 experts. If the prisoner or county’s designated counsel do not
21 demand a jury trial, a bench trial will be conducted. Id. § 6603(e).
22 The court or jury shall determine whether, beyond a reasonable
23 doubt, the prisoner is a sexually violent predator. Id. § 6604. A
24 unanimous verdict is required in any jury trial. Id. § 6603(f). “If
25 the court or jury is not satisfied beyond a reasonable doubt that the
26 person is a sexually violent predator, the court shall direct that the
person be released at the conclusion of the term for which he or she
was initially sentenced.” Id. But if the court or jury determines
following a trial that the person is a sexually violent predator, then
the prisoner is deemed an SVP and civilly committed for two years
in a facility designated by the California Department of Mental
health. See id. § 6604. The SVP is then committed to the custody
of the Department of Mental Health “for appropriate treatment and
confinement in a secure facility” Id.

19 An SVP may not be civilly committed for more than two years
20 unless a new petition for commitment is filed and a subsequent re-
21 commitment is obtained pursuant to the same safeguards detailed
22 above. See id. Once every year, the civilly committed SVP has a
23 right to a “show cause” hearing to determine whether her or his
24 condition has changed such that she or he no longer poses a danger
25 to others. See id. § 6605. If the superior court at the show cause
26 hearing determines that the SVP’s condition has changed, then
another hearing is held by the court to permit the State to show that
the SVP remains a danger to others. Again, if the . . . [SVP] or
county’s designated counsel do not demand a jury trial, a bench
trial will be conducted to determine whether the SVP remains a
danger to others. If the court or jury finds in favor of the civilly
committed SVP, then the person must be released. If, however, the

1 court or jury finds in favor of the State, the person is recommitted
2 for two more years. See id. §§ 6605, 6608.

3 Carty v. Nelson, 426 F.3d 1064, 1066-68 (9th Cir. 2005).

4 At the time of plaintiff's 2002 SVPA proceedings, a sexually violent predator
5 was defined as follows:

6 a person who has been convicted of a sexually violent offense
7 against two or more victims and who has a diagnosed mental
8 disorder that makes the person a danger to the health and safety of
others in that it is likely that he or she will engage in sexually
violent criminal behavior.

9 Cal. Wel. & Inst. Code § 6600(a)(1).

10 "Sexually violent offense" means the following acts when
11 committed by force, violence, duress, menace, or fear of immediate
12 and unlawful bodily injury on the victim or another person, and
13 that are committed on, before, or after the effective date of this
article and result in a conviction or a finding of not guilty by reason
of insanity [for enumerated California Penal Code sections] . . .

14 Id. at § 6600(b). The sexually violent offense could be a prior or current conviction that resulted
15 in a determinate prison sentence, a prior conviction that resulted in the grant of probation, or a
16 prior conviction in another jurisdiction. Id. at § 6600(a)(2). "No restriction is placed on the time
17 at which a prior qualifying crime must have occurred." Hubbs, 360 F. Supp. 2d at 1077.

18 ANALYSIS

19 As noted above, plaintiff claims that Dr. Miccio-Fonseca violated his right to due
20 process by: (1) relying on his 1984 South Dakota conviction for raping his step-daughter in
21 preparing her evaluation; (2) failing to provide plaintiff with advance notice of his February 2001
22 interview; and (3) failing to record plaintiff's mental examination.

23 First, defendant correctly argues that the SVPA does not require that the evaluator
24 provide written notice before conducting the evaluation. As one district court has stated in
25 rejecting a nearly identical claim:

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SVPA does not provide for notification prior to screening and evaluation. Nor is it clearly established that the Due Process Clause requires such notification. The screening and evaluation process does not appear to amount to the sort of dispositive hearing for which a prisoner needs advance notice to marshal the facts and prepare a defense. Cf. Wolff v. McDonnell, 418 U.S. 539, 564, 94 S. Ct. 2963, 41 L. Ed.2d 935 (1974) (prisoner facing disciplinary hearing must be given advance notice of disciplinary charges against him in order to enable him to marshal the facts and prepare a defense). That generally will come at the probable cause hearing and jury trial, if a petition for commitment is filed. Not surprisingly, there is no Supreme Court precedent requiring that an individual must be given notification prior to being screened and evaluated under the circumstances of this case.

Woodward v. Mayberg, 242 F. Supp. 2d 695, 704-05 (N.D. Cal. 2003). See also Huftile v. Vognesen, No. Civ. S-03-0604 RRB JFM P, 2007 WL 1813711, at *6 (June 22, 2007)

(“However, the SVPA does not provide for advance notice prior to interview by the mental health professional.”) Because plaintiff cannot succeed on the merits of this due process claim, he has not stated a cognizable claim for injunctive relief in that regard.

Likewise, there is no authority for the proposition that plaintiff has a federal constitutional right to have his SVPA interviews or evaluations recorded. See Pritchett v. Hunter, No. C 05-0764 PJH (PR), 2008 WL 4183932, at *13 (N.D. Cal. Sept. 9, 2008) (concluding that the petitioner’s contention that he was civilly committed in violation of state laws and procedures based on lack of notice and failure to provide him with a tape recording of his psychological interview failed to support a due process claim). Again, because plaintiff cannot prevail on his claim that his due process rights were violated in this regard, he has not stated a cognizable claim for prospective injunctive relief.

Finally, plaintiff has not stated a cognizable due process claim with respect to Dr. Miccio-Fonseca’s consideration of his 1984 South Dakota conviction, for raping his step-daughter, in her evaluation. See Huftile v. Hunter, Civ. S-05-0174 GEB DAD, 2009 WL 111721, (E.D. Cal. Jan. 16, 2009) (discussing in the context of plaintiff’s habeas challenge to his civil commitment, the role his 1984 South Dakota offense played in his civil commitment). As

petitioner himself has alleged, any challenge to the accuracy of documents relating to that prior conviction was addressed at his civil commitment trial. (Third Am. Compl. at 6.) Such a challenge may be mounted again should plaintiff have objection to the matters considered in any subsequent SVPA review proceedings. Plaintiff is not entitled, under the U.S. Constitution, to one particular psychological or psychiatric diagnosis. Plaintiff's disagreement with Dr. Miccio-Fonseca's evaluation or the matters she considered in reaching her conclusions was more properly raised during the probable cause hearing, in his subsequent civil commitment jury trial, on appeal in state court and in his federal habeas action.¹⁴ Because plaintiff has not prevailed and cannot now prevail on this due process claim, he cannot be entitled to the requested injunctive relief.

In addition, the undersigned finds that plaintiff has alleged no facts establishing that he will suffer irreparable harm if the requested prospective injunctive relief is not granted. As noted above, in his third amended complaint plaintiff seeks prospective injunctive relief that would bar Dr. Miccio-Fonseca from reaching the same conclusions she reached in her 2001-02 evaluations of plaintiff, expunging those allegedly flawed evaluations from his record and prohibit the doctor from "approaching Plaintiff Huftile in any manner in the future." (Third Am. Compl. at 16.) Whether or not Dr. Miccio-Fonseca poses a future threat to plaintiff in this regard is purely speculative. Plaintiff has not alleged that Dr. Miccio-Fonseca played a role in his SVPA proceedings subsequent to 2002. In fact, it is clear that she did not. Huftile, 410 F.3d at 1142 ("Dr. Miccio-Fonseca did not conduct any of the evaluations underlying the state's recommitment petition."). The allegations in plaintiff's third amended complaint pertain only to Dr. Miccio-Fonseca's 2001 and 2002 evaluations leading up to the 2002 civil commitment trial. It is now clear that plaintiff continues to focus on alleged defects in those 2001 and 2002 reports

¹⁴ In fact, plaintiff has taken advantage of these opportunities, arguing in each of those proceedings, in one form or another, that his South Dakota conviction for raping his step-daughter was not a sexually violent offense that could serve as the predicate for a civil commitment under the SVPA.

1 and their consideration of his 1984 conviction for raping his step-daughter and that he is in fact
2 seeking to undo what has been done rather than attempt to stop it from happening again in the
3 future. As noted above, this case is limited to prospective injunctive relief only. Accordingly,
4 plaintiff has failed to allege facts demonstrating any threat of irreparable injury specifically from
5 Dr. Miccio-Fonseca in the future.

6 For the reasons set forth above, this action for prospective injunctive relief should
7 therefore be dismissed. Although not necessary to the disposition of the pending motion, the
8 undersigned notes that as clarified by the allegations of the third amended complaint this action
9 may fall within that category of cases still barred by Heck even though plaintiff seeks only
10 prospective injunctive relief. See Wilkinson v. Dotson, 544 U.S. 74, 81-82 (2005) (holding that
11 “a state prisoner’s § 1983 action is barred (absent prior invalidation) - no matter the relief sought
12 (damages or equitable relief), no matter the target of the prisoner’s suit (state conduct leading to
13 conviction or internal prison proceedings) - *if* success in that action would necessarily
14 demonstrate the invalidity of confinement or its duration.”)

15 As noted, plaintiff asserts that he is not challenging Dr. Miccio-Fonseca’s
16 “ultimate conclusion . . . [as to] whether Plaintiff had (past) a diagnosable mental disorder, and is
17 therefore likely to engage in acts of sexual violence” but rather is challenging the lack of
18 procedural due process evidenced by defendant’s impartiality and failure to establish the
19 reliability of documents before using the South Dakota offense in her evaluation. (Third Am.
20 Compl. at 8.) The distinction drawn by plaintiff, however, does not withstand scrutiny. As the
21 Ninth Circuit has already explained in this case,

22 [T]he structure of the SVPA statutory scheme indicates that the
23 success of Huftile’s § 1983 claim would necessarily imply the
24 invalidity of his civil commitment. Before the California Director
25 of Mental Health can forward a request for an SVPA commitment
26 petition to the appropriate county, two evaluators must agree that
the person has a diagnosed mental disorder so that he or she is
likely to engage in acts of sexual violence without appropriate
treatment and custody. Cal. Welf. & Inst. Code § 6601(d). An
attorney for that county may then file a petition for commitment.

1 Id. § 6601(i). A judge must then review this petition to determine
 2 whether there is probable cause to believe that the person is likely
 3 to engage in sexually violent predatory criminal behavior upon
 4 release. Id. § 6602(a). Because Dr. Miccio-Fonseca was one of
 5 Huftile's evaluators, a judgment in favor of Huftile in his § 1983
 6 action would necessarily imply the invalidity of his civil
 7 commitment. That is, if only one evaluator, rather than two, had
 8 concluded that Huftile had a mental disorder within the meaning of
 9 § 6601(d), there would have been no basis for the state Director of
 10 Mental Health to send the request to the county, no basis for the
 11 county attorney to file a petition for commitment, and no basis for
 12 the judge to go forward with a probable cause determination.

13 Huftile v. Miccio-Fonseca, 410 F.3d at 1140-41. See also Hubbs, 360 F. Supp. 2d at 1080
 14 (plaintiff's allegations that the defendant psychologist had included false statements and
 15 misrepresentations in the evaluation report were barred because they implicated the validity of
 16 plaintiff's SVPA civil commitment); Kitchens v. Houge, No. Civ S-04-1206 MCE PAN P, 2006
 17 WL 2223881, at *3 (E.D. Cal. Aug. 2, 2006) (concluding that success on plaintiff's claims that
 18 the two evaluators had violated his right to due process by relying on documents in his CDC
 19 Central File would implicate the validity of plaintiff's civil commitment term).

20 The undersigned recognizes that the Ninth Circuit previously reversed this court's
 21 dismissal of plaintiff's claim for injunctive relief as Heck-barred, noting that "[o]rdinarily, a
 22 prayer for . . . prospective relief will not 'necessarily imply' the invalidity of a previous loss of
 23 good-time credits, and so may properly be brought under § 1983." Huftile, 410 F.3d at 1141
 24 (quoting Edwards v. Balisok, 520 U.S. 641, 648 (1997)). However, when the appellate court did
 25 so it was faced with a claim which vaguely sought injunctive relief only to prevent "Defendant
 26 from inflicting further injury" on plaintiff. Id. Now, in his third amended complaint, plaintiff
 has made clear that he actually seeks the expungement of Dr. Miccio-Fonseca's 2001 and 2002
 evaluations from his record. As the Ninth Circuit has recognized, those evaluations were
 essential to plaintiff's civil commitment and were they to be expunged, the validity of that
 commitment would clearly be implicated. 410 F.3d at 1141. Thus, this may well be a case
 where plaintiff's specific claim for prospective injunctive relief is so intertwined with his

1 substantive claims that a favorable ruling on the former would imply the invalidity of his civil
2 commitment and would therefore be barred under Heck. Nonetheless, the court need not resolve
3 this issue. In his third amended complaint plaintiff has failed to state any cognizable claim that
4 his due process rights were violated by defendant. Accordingly, his complaint should be
5 dismissed.¹⁵

6 CONCLUSION

7 In accordance with the above, IT IS HEREBY RECOMMENDED that:

- 8 1. Defendant's Rule 12(b)(6) motion to dismiss plaintiff's third amended
9 complaint (Doc. No. 59), filed on December 22, 2008, be granted; and
10 2. This action be closed.

11 These findings and recommendations are submitted to the United States District
12 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fifteen
13 days after being served with these findings and recommendations, any party may file written
14 objections with the court and serve a copy on all parties. Such a document should be captioned
15 "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections
16 shall be served and filed within five days after service of the objections. The parties are advised

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21 ¹⁵ The undersigned does not find defendant's Younger abstention argument to be
22 persuasive. Defendant does not assert that there is a pending state court proceeding but instead
23 merely contends that plaintiff is subject to annual review of his mental condition and a hearing if
24 his mental health evaluation shows his condition has improved. Younger abstention, however,
25 applies when (1) state proceedings, judicial in nature, are pending, (2) state proceedings involve
26 important state interests; and (3) the state proceedings afford adequate opportunity to raise the
constitutional issue. See Middlesex County Ethics Comm. v. Garden State Bar Ass'n, 457 U.S.
423, 432-34 (1982). Were defendant's rationale to be adopted, plaintiff could never file an
action in federal court as long as he was civilly committed because state review proceedings
would always be, in a sense, ongoing. Here, the abstention doctrine does not apply because there
is no pending civil commitment proceeding involving plaintiff.

1 that failure to file objections within the specified time may waive the right to appeal the District
2 Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

3 DATED: September 17, 2009.

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7 DALE A. DROZD
8 UNITED STATES MAGISTRATE JUDGE

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